In the Supreme Court of the United States

October Term, 1976

Case No. 76-496

BENSON A. WOLMAN, ET AL.,
Plaintiffs-Appellants,

v.

MARTIN W. ESSEX, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

MOTION TO AFFIRM

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THE JUDSON-BROOKS COMPANY—CLEVELAND

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Defendants-Appellees, Martin W. Essex, Superintendent of Public Instruction of the State of Ohio, State Board of Education, Gertrude W. Donahey, Treasurer of Ohio, Thomas E. Ferguson, Auditor of Ohio, and the Board of Education of the City School District of Columbus, Ohio, pursuant to Rule 16 of the Rules of this Court, respectfully move that the final judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment, entered July 21, 1976, by a District Court of three judges specially convened pursuant to 28 U.S.C. § 2284, dismissing appellants' complaint attacking the validity of Section 3317.06 of the Ohio Revised Code.

THE STATUTE INVOLVED

Section 3317.06, *supra*, provides certain specified forms of assistance to students in non-public schools. The statute is set forth at pages A34 to A38 of the jurisdictional statement.

It was enacted following *Meek* v. *Pittenger*, 421 U.S. 349 (1975), to eliminate those forms of assistance which this Court found constitutionally objectionable in that case.

The statute requires the various school districts to: purchase secular textbooks which have been approved for use in the public schools and loan them to students attending non-public schools; purchase secular, neutral and non-ideological instructional materials and equipment which are used in the public schools and loan them to students attending non-public schools; provide certain specified diagnostic and health services to students attending non-public schools; provide certain specified auxiliary and remedial services to students attending non-public schools; supply standardized tests used in the public schools for the use of students attending non-public schools; and provide field trip transportation for students attending non-public schools.

The statute specifically provides that each of its provisions is independently and fully severable. See also: Section 1.50 of the Ohio Revised Code.

The statute limits the materials and services available to those which are available to students attending public

schools in the district; provides that the students, in order to be eligible to receive the materials or services, attend schools where admission and hiring policies make no distinction as to race, creed, color or national origin; and prohibits the provision of materials or equipment which are capable of diversion to religious use.

PROCEEDINGS BELOW

Plaintiffs-appellants instituted a class action contending that Section 3317.06, *supra*, is a law respecting an establishment of religion which is prohibited by the First Amendment.

The District Court analyzed each provision of the statute under the principles established in *Meek* v. *Pittenger*, *supra*, 421 U.S. 349; and other applicable decisions of this Court. It found that each of the provisions is constitutional and that the plaintiffs' complaint was without merit. It, therefore, dismissed the complaint.

Appellants in their jurisdictional statement have conceded the validity of the physician, nursing, dental and optometric services provided under the statute. They have also conceded the validity of therapeutic, counselling and remedial services which are furnished in the public schools.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

Appellees respectfully submit that Section 3317.06, *supra*, is valid under the three part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." (403 U.S. at 612-613.) (Citations omitted.)

See also: *Roemer* v. *Bd. of Public Works,* ..... U.S. ....., 96 S.Ct. 2337, 2345 (1976); *Meek* v. *Pittenger, supra,* 421 U.S. at 358.

The statute does have a secular legislative purpose: to improve the quality of education throughout the state and to provide students with educational handicaps the opportunity to proceed at the same educational level as their more fortunate classmates.

The principal or primary effect of the statute neither advances nor inhibits religion. It makes available to all children in the state, those in non-public schools as well as public schools, benefits in the form of secular educational materials and health and remedial services. No benefits whatsoever are provided to sectarian schools.

The statute does not foster an excessive government entanglement with religion. The benefits available under the statute are provided to all students in the state. The only distinction between students attending non-public rather than public schools is the location where they receive the benefits. The risk of political entanglement is, therefore, minimal. If there is a demand in the future to increase the level of benefits, the proponents will be those who generally favor remedial and special educational benefits for students. Political debate on the question will not be drawn along religious lines.

There is also little risk of administrative entanglement. There is no need for continuing government surveillance. The textbooks, materials and equipment need be examined only once to insure that their content is secular and incapable of diversion to sectarian use.

No services which have any relation to the educational function of a sectarian school will be performed on the school premises. There is, therefore, no risk that the personnel rendering the services will be "affected by an atmosphere dedicated to the advancement of religious belief" and no temptation for the sectarian schools to compromise their religious mission.

Appellants in their jurisdictional statement attempt to distinguish the programs available under Section 3317.06, *supra*, from those which have previously been found valid by this Court. Appellees respectfully submit that the claimed distinctions have no legal significance.

Textbooks

The parties have stipulated that the textbooks available under the statute will be the same as those used in the public schools. The phrase "textbooks including book substitutes" is limited to books, reusable workbooks and manuals intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

This portion of the program is identical to that upheld in *Meek* v. *Pittenger, supra,* 421 U.S. at 354 n. 3.

Instructional Materials And Equipment

The benefit of this portion of the program is to the students and their parents. The sectarian schools receive no materials or equipment. They are loaned to the pupils or their parents upon individual request.

Appellants contend that the beneficiaries of the aid is constitutionally insignificant citing *Committee For Public Education* v. *Nyquist,* 413 U.S. 756 (1973).

Appellees submit that this contention is foreclosed by the decisions in *Meek* v. *Pittenger, supra,* 421 U.S. at 360; *Bd. of Education* v. *Allen,* 392 U.S. 236 (1968); and *Everson* v. *Bd. of Education,* 330 U.S. 1 (1947) and that the *Nyquist case* is distinguishable because of the form of the aid involved therein.

Nyquist involved financial aid for maintenance and repair of non-public school facilities and reimbursement grants and income tax credits for tuition to non-public schools. This type of aid either presents a risk of advancing religion or fosters excessive entanglements between church and state. In the absence of restrictions financial aid could be used to benefit either the educational or the religious functions of the sectarian schools. If there are such restrictions it would require continuing and intrusive government surveillance to insure that the restrictions were obeyed.

The benefits involved herein pose no such problem. The materials and equipment involved, like textbooks, are inherently secular and cannot be diverted to religious use. There is, therefore, no need for any government surveillance.

Appellents also contend that the program is invalid because the materials and equipment are not limited to items which can be distributed to individual pupils and because the materials may be stored on non-public school premises.

Appellees submit that neither of these facts have any legal significance. The textbooks will be available for individual use. Their only educational value, however,

comes from their group use in class. In fact the parties have stipulated that only those textbooks which are to be used as the principal source of study material for a given class or group, may be loaned.

The fact that the materials and equipment are stored on the school premises has no effect on the validity of the program. The same was true of the textbooks in both New York and Pennsylvania. *Meek* v. *Pittenger, supra,* 421 U.S. at 361 n. 9.

Diagnostic Services

Appellants concede the validity of the physician, nursing, dental and optometric services. They seek to distinguish psychological and speech and hearing diagnosis, apparently on the basis of the amount of communication involved between the student and the person performing the diagnosis.

The diagnostic services identify those students who have educational handicaps so that they might seek corrective treatment. They are public health services provided in common to all students in the state. They are secular and not related to the educational function of the schools that the handicapped students attend.

The previous decisions of this Court establish that such a program is constitutionally permissible. The state may properly include church related schools in general programs providing secular services, unrelated to the primary educational function of such schools. See, e.g., *Meek* v. *Pittenger, supra,* 421 U.S. at 364; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 616. Nothing in the language or reasoning of any of the applicable decisions indicates that the validity of such services depends upon the amount of communication which they involve.

Therapeutic And Remedial Services

These services are provided in common to all students in the state who require special treatment or assistance. The school which such students attend is relevant only as to the location in which they will receive the services. Most students in the public schools will receive the services in the school they attend. Students in the non-public schools will receive the services in the public school, in a public center or in a mobile unit.

Appellants concede the validity of providing such services in public schools. They claim, however, that it is unconstitutional to provide such services to non-public school students in public centers or in mobile units. In support of their claim they state that when the services are provided in either public centers or mobile units, they might be rendered exclusively to students in sectarian schools. They also state that when the services are provided in mobile units the units may be stationed close to the premises of the non-public school.

This Court, in the *Meek case* held that Pennsylvania could not provide auxiliary services to sectarian schools. It found that there would be a constitutionally impermissible degree of entanglement between church and state in order for Pennsylvania to be certain that the auxiliary service personnel did not advance the religious mission of the schools in which they served. The opinion makes it clear that the risk that such personnel would attempt to foster religion and the resulting need for state surveillance arose because the services were provided in sectarian schools.

> But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (421 U.S. at 371.)

Appellees submit that nothing in that case or in any of the other applicable decisions of this Court would justify a requirement that services not be provided to groups of students with similar religious beliefs. Such a requirement would be meaningless as a practical matter. These services are not provided in a group setting. The parties have stipulated that the services will usually be provided individually or to small groups of students who require similar treatment.

In addition there is no justification for such a requirement. It is unrealistic to assume that a person rendering a remedial or therapeutic service will be so affected by the religious beliefs of the students receiving the service that he would be tempted to advance those beliefs. Even if there were a possibility that the personnel would be so affected, it would not be affected in any way by the statute. The same possibility would exist whether the students attended public or non-public schools and whether the services were performed in a public school, public center or mobile unit.

The fact that the mobile units may be parked close to a non-public school has no effect on the validity of the services. Appellees respectfully submit that a restriction on access to the services for certain students merely because they choose to attend sectarian schools would raise serious problems under the free exercise clause.

Appellants also claim that a substantial portion of the public funds might be expended to construct public centers. The construction of such centers would appear to be permissible. See, e.g., *Hunt* v. *McNair*, 413 U.S. 734 (1973). However, that issue is not raised in the instant case. Nothing in the statute authorizes the expenditure of funds for capital improvements.

No therapeutic or remedial services will be provided on the premises of non-public schools in Ohio. The atmos-

phere in such schools could not affect the personnel. There would also be no possibility of provoking controversy between the auxiliary personnel and religious authorities over the services provided.

Testing Services

Local public school districts are permitted to supply to students in non-public schools those standardized tests and scoring services used in the public schools. The tests are used to measure the progress of the students in secular subjects.

The state may properly insist that all schools, non-public as well as public, meet certain minimum requirements as to the quality and nature of the curriculum. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). These tests furnish a non-intrusive means to determine whether these requirements are being satisfied.

Appellants claim that such testing is unconstitutional under *Levitt* v. *Committee For Public Education*, 413 U.S. 472 (1973). In *Levitt* the state provided direct money grants to non-public schools to reimburse them for certain state required services including testing. One constitutional defect in the program was the absence of any restriction to assure that the money would not be used for sectarian purposes. (413 U.S. at 477.) Another problem was that the tests were prepared by teachers under the authority of the sectarian institutions. This created the risk that the teachers would draft the tests with a view to advancing the religious beliefs of the sponsoring church. (413 U.S. at 480.)

Neither problem is present in the instant case. No financial aid is involved. The tests are prepared for, and used in, the public schools.

Bus Transportation

Appellants attempt to distinguish *Everson* v. *Bd. of Education*, *supra*, 330 U.S. 1, on the grounds that the transportation in that case was scheduled at regular morning and afternoon times and was less directly related to the educational program of the schools.

Appellees respectfully submit that furnishing transportation for field trips is no more directly related to the educational program than furnishing transportation for regular classroom work. They also submit that the timing of the transportation has no bearing on its validity. In Ohio as in New Jersey, the state merely enables parents to get their children safely and expeditiously to and from school.

CONCLUSION

Appellees respectfully submit that the District Court, in its opinion, correctly followed and applied the principles established by the applicable decisions of this Court. The questions raised by this appeal are so unsubstantial as not to need further argument. Appellees respectfully move this Court to affirm the judgment of the District Court.

Respectfully submitted,

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